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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-940

RALPH DE TOLEDANO,

Petitioner,

v.

RALPH NADER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Ralph Nader respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the District of Columbia Court of Appeals' decision in this case.

REASONS FOR DENYING THE WRIT

1. This Court is without jurisdiction because the decision below is not a final judgment or decree.

The trial court granted summary judgment to petitioner de Toledano and dismissed respondent's libel claim. The District of Columbia Court of Appeals reversed and remanded the case for further proceedings consistent with its opinion.[1] It held that "a jury triable genuine issue of material fact existed." Petition, Appendix at 63a.

This Court's jurisdiction on certiorari to the District of Columbia Court of Appeals is limited to "final judgments or decrees." 28 U.S.C. § 1257. As this Court held in *Switzerland Cheese Association, Inc. v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966):

> [T]he denial of a motion for summary judgment because of unresolved issues of fact does not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial.[2]

Thus denial of summary judgment, at least when based on the existence of a factual dispute, as in this case, is not a final judgment.[3] Lack of finality is itself sufficient

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[1]The summary judgment granted to de Toledano's publisher, Copley Press, Inc., was affirmed by the court below. Respondent has not petitioned for a writ to review that determination.

[2]*Switzerland Cheese* held that a federal appellate court lacks jurisdiction of an appeal under 28 U.S.C. § 1292(a)(1) from denial of a summary judgment motion, even though the effect of the denial was to "refuse" a permanent injunction.

[3]*See* Goldstein v. Cox, 396 U.S. 471, 475 (1970). Like *Switzerland Cheese*, *Goldstein* involved an appeal from denial of

[footnote continued]

ground for denying the writ. *Hamilton-Brown Shoe Company v. Wolf Brothers & Company*, 240 U.S. 251 (1916).

In considering jurisdiction over state court judgments, even though "further proceedings in the lower state courts [are still] to come," this Court has found finality in four categories of cases. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 477, 479-485 (1975). In the first category are cases where trial is still to come, but the federal issue is "conclusive or the outcome of further proceedings preordained." *Id.* at 479. Thus, in *Mills v. Alabama*, 384 U.S. 214 (1966), where a state supreme court reinstated a criminal complaint and remanded the case for trial, this Court accepted an appeal[4] because editor Mills had admitted publishing an editorial of the very sort proscribed by an Alabama statute. His trial

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summary judgment for injunctive relief. It came to this Court on appeal from a three-judge court pursuant to 28 U.S.C. §1253, which is analogous to §1292(a)(1). Although both cases arose under interlocutory appeal statutes, they illustrate the non-finality of summary judgment denials. The lack of finality is even clearer here, where no injunction is involved. *See* Village Voice, Inc. v. Rinaldi, 423 U.S. 883 (1975), denying certiorari on reversal of summary judgment "for want of a final judgment."

Federal courts of appeals have almost universally held that such denials are not appealable final orders under 28 U.S.C. §1291. *See* cases cited in 6 Moore, FEDERAL PRACTICE ¶ 56.2[2]nn.3, 6 (2d ed. 1979). In Florian v. United States, 114 F.2d 990 (7th Cir. 1940), where the court of appeals entertained an appeal of a denial of summary judgment, this Court reversed per curiam, 312 U.S. 656 (1941), "because of the absence of a final judgment in the District Court." *A fortiori*, reversal of a defendant's summary judgment should not be reviewable by this Court under §1257. *See* Cox Broadcasting Corp. v. Cohn, *supra*, at 502-03 (Rehnquist, J., dissenting).

[4]Under §1257 finality is required for appeal as well as certiorari.

would have been "no more than a few formal gestures leading inexorably towards a conviction," after which the case would have to "wind its weary way" back to the Court for adjudication of the constitutional issue. 384 U.S. 217. Here, however, de Toledano, unlike Mills, has raised numerous defenses, including the defense of truth (Answer, R. 321-324), and the outcome of trial is unpredictable.

The second category of cases whose finality was recognized in *Cox Broadcasting* encompasses those, such as *Radio Station WOW, Inc. v. Johnson,* 326 U.S. 120 (1945), where a state supreme court finally decides the federal question and orders further proceedings, but the federal question will survive the outcome of such proceedings and still require decision. In *Radio Station WOW,* where the Nebraska Supreme Court ordered transfer of the station's properties, it rejected the claim that the transfer would interfere with the station's federal license and remanded the case for an accounting. This Court took jurisdiction because the state supreme court had spoken its final word on the federal issue and the accounting which it ordered was "dissociated" from that issue. 326 U.S. at 126-27. Here, however, the D.C. Court of Appeals has spoken no final word, and the federal issue cannot be dissociated from the trial which it ordered. The only decision below is that the factual dispute on the question of actual malice cannot be determined without a jury trial. Whether the federal issue will survive the trial depends on the verdict. If petitioner prevails, it will be unnecessary to decide the federal issue.

The third category includes cases where, regardless of the outcome of further state proceedings, the federal issue cannot be reviewed later. Typical is a state supreme

court reversal of a conviction on constitutional grounds with remand for a new trial. If the state secures a second conviction, the federal issue is mooted; if the jury acquits, the state cannot appeal. *California v. Stewart,* 384 U.S. 436, 498n.71 (1966). Similarly, in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973), a state supreme court held unconstitutional the statute under which the Board denied a pharmacy permit and remanded the case for further Board consideration. This Court granted certiorari because, regardless whether the Board were to deny the permit on state grounds (thereby eliminating the federal issue) or were to grant it (thereby eliminating any appeal under state law), the federal issue would have been foreclosed. Here, however, if the jury verdict were to be in respondent's favor, petitioner would have full opportunity to raise again his federal question before the D.C. Court of Appeals and, if unsuccessful there, to petition for certiorari.[5]

The fourth category recognized in *Cox Broadcasting* covers cases where a result favorable to petitioner in this Court would preclude further litigation and refusal of immediate review "might seriously erode federal policy," 420 U.S. at 482-83. Here, to be sure, reinstatement of summary judgment would end the case, but declining immediate review will not erode any federal policy.

In *Cox Broadcasting,* the Georgia Supreme Court rejected a constitutional attack on a statute prohibiting publication of a rape victim's name and remanded the

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[5] *Compare* Cox Broadcasting Corp. v. Cohn, *supra,* 420 U.S. at 511-12 (Rehnquist, J., dissenting), concerning the then pending petition in Time, Inc. v. Firestone, *with* the subsequent grant of that petition, 421 U.S. 909, *and* the opinions on the merits, which suggest no jurisdictional problem, 424 U.S. 448 (1976).

case for trial. This Court entertained an appeal because the constitutional issue was not subject to further review in Georgia, and even if the appellants were to prevail at trial, the state supreme court decision banning publication of a rape victim's name would still stand. This would leave the Georgia press "operating in the shadow of criminal and civil sanctions." 420 U.S. at 486. Here the court below created no such situation. Its decision upheld no statute and proclaimed no policy adversely affecting First Amendment rights. It held "only that based on the record as it existed before the trial court, a jury triable genuine issue of material fact existed." Petition, Appendix at 63a.

In *Miami Herald Publishing Company v. Tornillo,* 418 U.S. 241 (1974), the Florida Supreme Court upheld the constitutionality of a statute requiring newspapers to print replies to published criticisms of political candidates and remanded the case for trial. This Court granted review because it found that the constitutionality of the right-of-reply statute was of overriding importance and that, in light of the upcoming 1974 elections, the need for decision was especially urgent. 418 U.S. at 247n.6. No such considerations are present here.

Other cases in the fourth category have likewise involved extraordinary considerations of federal policy that are not present here. *Hudson Distributors, Inc. v. Eli Lily & Company,* 377 U.S. 386 (1964), concerned the compatibility of state fair trade acts with federal antitrust laws; *Mercantile National Bank v. Langdeau,* 371 U.S. 555 (1963), concerned the erosion, by suits in state courts, of the federal statutory policy controlling the venue of suits against national banks; and *Construction Laborers v. Curry,* 371 U.S. 542 (1963), concerned state-court attempts to adjudicate labor disputes that were within the exclusive province of the NLRB.

The decision below threatens no federal policy affecting freedom of the press; it contains no last word for the District of Columbia on any constitutional issue.[6] In short, it is not a final judgment.

2. The decision below does not conflict with this Court's decision in *Time, Inc. v. Pape.*

The petitioner's contention that the decision below conflicts with *Time, Inc. v. Pape,* 401 U.S. 279 (1971), is based on a misconception of the *Pape* decision and of this Court's role in judicial review.

Pape did not come to this Court from a reversal of the defendant's summary judgment. There the trial court granted the defendant dismissal or summary judgment twice, once before and once after this Court's decision in *New York Times Company v. Sullivan,* 376 U.S. 254 (1964); both times the Seventh Circuit reversed and remanded for trial; both times this Court denied certiorari. 375 U.S. 902 (1963); 384 U.S. 909 (1966). Not until after trial and after the court of appeals reversed a directed verdict for the defendant did this Court grant certiorari. *See* 401 U.S. 283. The procedures in *Pape* lend no support for certiorari here. On the contrary, this Court's double denial of certiorari when *Pape* was in the posture of this case argues against review at this early stage.

Moreover, on the merits *Pape* is inapposite. In *Pape* the asserted libel was Time's omission of the word "alleged" from its account of a Civil Rights Commission report that described police violence in Chicago. The

[6]The decision below does decide that the Seventh Amendment requires a jury trial of the disputed facts, but that point is not raised in the petition and in any event is correctly decided (*cf. Cox Broadcasting, supra,* 420 U.S. at 480n.13).

plaintiff claimed the omission made it appear that the Commission had made factual findings, when it was merely reciting allegations. This Court held the omission constitutionally permissible as Time's "adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities." 401 U.S. at 290.

Here, the asserted libel was not an omission, but a flat statement that Ralph Nader "falsified and distorted evidence to make his case against the automobile." On deposition, de Toledano confirmed he meant just that: "I intended to tell the reader that Mr. Nader lied and twisted facts to make a case," Petition, Appendix at 57a. His column also told the reader that Senator Ribicoff had conclusively demonstrated Nader's dishonesty. The subcommittee staff report on which de Toledano based his accusation could reasonably be read as a finding that Nader was mistaken about the Corvair, but not that he falsified evidence. As the court below observed, "Nowhere is it intimated that [Nader] falsified and distorted evidence." *Id.* at 62a.

Petitioner knew very well that the staff report stated that Nader's charges against GM and the Corvair "were made in good faith based on the information available to him." (*Id.* at 55a-57a). Petitioner's deliberate contradiction of this statement raises a jury question of actual malice.[7] *Time, Inc. v. Pape* involved no such facts.

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[7]The petition (at 3, 19) relies on the trial judge's inference, repeated by the dissent in the court below, that the staff report's finding of Nader's good faith was a "sugar coating for a bitter pill." Making that inference was impermissible not only because it was unfavorable to the party opposing summary judgment, but because it was judicial fact-finding in a jury case. *E.g.*, Adickes v. S. H. Kress & Co., 398 U.S. 144, 157-158 (1970).

3. The petition raises no novel or important issue of press freedom.

Petitioner contends that the decision below departs from the "constitutionally required standard of clear and convincing proof of actual malice," and therefore raises important freedom-of-press issues. The contention is untenable.

The court below did not depart from the convincing-clarity standard; it adhered to it. Said the court (Petition, Appendix at 55a):

> The question to be resolved at summary judgment is whether plaintiff's proof is sufficient such that a reasonable jury could find malice with convincing clarity, *and not whether the trial judge is convinced of the existence of actual malice.* (Emphasis in original.)

"Clear and convincing" is an evidentiary standard which, as the court below properly observed, is intermediate between the ordinary civil standard of preponderance of evidence and the criminal standard of proof beyond reasonable doubt. Petition, Appendix at 53a. The requirement of convincing clarity in libel actions is itself the special safeguard that protects First Amendment rights.

Where the issue of malice is in genuine dispute, as it is here, the question whether the libel plaintiff's proof meets the *New York Times* standard depends largely on the jury's assessment of the demeanor of witnesses. A trial judge who attempts to decide whether proof is convincingly clear invades the province of the jury. The

court below properly concluded (Petition, Appendix at 54a):

> [T]he special protection afforded press defendants in public figure libel actions [by the clear-and-convincing-evidence standard] does not necessitate a dilution of the Seventh Amendment by skewing the roles of judge and jury in summary judgment proceedings. It is engrained in American jurisprudence that the court may not resolve issues of fact or weigh evidence at the summary judgment stage in normal circumstances. We hold that the same principles applicable to normal summary judgment motions are applicable to such motions when made in a public figure libel action.

Adherence to normal summary judgment procedures[8] involves no impairment of press freedom. This Court has not regarded summary judgment in public-figure libel cases to be "the rule rather than the exception." *Hutchinson v. Proxmire*, ___ U.S. ___, 99 S.Ct. 2675, 2680 and n.9 (1979). The Court there said:

> [W]e are constrained to express some doubt about the so-called "rule." The proof of "actual malice" calls a defendant's state of mind into question [citation omitted] and does not readily lend itself to summary disposition.

Petitioner's Conclusion, recognizing that this case is hardly in a posture for the Court to "elucidate its views" about summary judgment in libel cases, alternatively seeks summary reversal on the authority of *Time, Inc. v. Pape*. As shown above, that case does not control this one. Moreover, petitioner misconceives the role of this

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[8]D.C. Superior Court Civil Rule 56, Summary Judgment, is identical to Fed. R. Civ. P. 56.

Court. As stated in Stern & Gressman, SUPREME COURT PRACTICE 297-98 (5th ed. 1978):

> It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions. * * * The Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous. * * * (Footnote omitted.)

Even if the decision below were erroneous, its lack of finality makes it a poor candidate for review merely to correct error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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